No. 16124.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CHARLES WOOD,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service, United States Department of Justice,

Appellee.

BRIEF OF APPELLEE.

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Jurisdiction.

The District Court had jurisdiction of the action for review of a final order of deportation pursuant to Title 28, United States Code, Section 2201, and Title 5, United States Code, Section 1009, as alleged in the complaint [R. 2].

This Court has jurisdiction to review the judgment of the District Court [R. 11-16] in favor of the defendant and against the plaintiff, and upholding the deportation order as valid, pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294(1), the judgment of the District Court being a final order.

Statutes and Regulations Involved.

Section 241(a)(4) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(4)] reads as follows:

"§*1251. Deportable aliens—General classes*

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, *or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,* regardless of whether confined therefor and regardless of whether the convictions were in a single trial;" (emphasis supplied).

Section 211 of the California Penal Code reads as follows:

"§*211. Robbery defined*

Robbery is a felonious taking of the personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Statement of the Case.

At the hearings before the Immigration and Naturalization Service the appellant was found deportable under Title 8, United States Code, Section 1251(a)(4), on a finding of conviction of "two crimes involving moral turpitude, *not* arising out of a single scheme of criminal misconduct."

The principal question on this appeal is whether or not the two crimes of which appellant was convicted arose out of a "single scheme" or whether, as the District Court so held, they did *not* arise out of a single scheme of criminal misconduct and therefore appellant was deportable.

The second question raised in Appellant's Brief, Point One (App. Br. p. 4), is that the convictions are not final and therefore cannot be the basis for deportation, because the suspended sentence given to appellant could be modified under Section 1203.1 of the California Penal Code. The deportation statute refers to the word "conviction" and the question of what sentence is or is not imposed is immaterial and no further treatment of this point is made in this brief.

The facts, as found by the District Court, in affirming the findings of the Immigration Service are not in dispute. The Administrative File of the Immigration Service was offered in evidence and is available as an original exhibit, in this Court. This file indicates that plaintiff was convicted on July 9, 1957, in the Superior Court, Los Angeles County, after submission of the matter on the transcripts, of two counts of burglary, first degree, under Section 211 of the California Penal Code. According to Count One, on July 13, 1956, plaintiff and three others forceably took $100 in cash from Herbert Rosenberg. Count Two alleged that on July 16, 1956, plaintiff and two others forceably took $300 in cash from Eugene Charlotte, while armed with deadly weapons (2 revolvers). The appellant was sentenced for the term prescribed by law for the crimes which the judge declared to be robbery of the first degree (not less than five years according to Section 213 of the California Penal Code),

and the sentences were suspended and appellant placed on probation for five years, the terms of probation being that he serve the first six months in the County Jail and make restitution (Exhibit 2 to the Immigration File in evidence, and page 2 of the Special Inquiry Officer's decision of August 19, 1957).

ARGUMENT.

I.

The Two Crimes of Robbery Committed on July 13 and July 16, 1956, of Which Appellant Was Convicted, Did Not Arise Out of a Single Scheme of Criminal Misconduct.

There are three cases involving the question of interpretation of the words in the deportation statute under Section 1251(a)(4) "not arising out of a single scheme of criminal misconduct" which are as follows:

Khan v. Barber, 253 F. 2d 547;

Jeronimo v. Murff, 157 Fed. Supp. 808;

Miceli v. Landon, 238 F. 2d 864.

The above cases arrive at different decisions, depending upon the factual situation in each case, and it would appear that the issue involved is one largely for the individual determination of each court, case by case. The Immigration Service concluded that the crimes did not arise out of a single scheme of criminal misconduct, and the District Court in its findings and judgment [R. 15] held that the deportation proceedings were in accordance with law.

It should be noted here that the crimes occurred on different dates, July 13 and July 16; that the robbery was of different victims, at different places; that different per-

sons were involved in the carrying out of the crimes; and that different methods of procedures were used, the second crime being carried out with two revolvers.

In the *Jeronimo* case, the court denied the Government's motion for summary judgment and held that the conviction of the various counts of the indictment constituted "a single criminal plan" and that all the acts were part of "one scheme." There the two convictions which underlay the deportation action were returned during a single trial. The relationship between the conspiracy charge in Count One and the several substantive counts, taken together with the language of the concluding paragraph of the indictment which reads "all of the acts and transactions alleged in each of the several counts in this indictment are connected together and constitute parts of a common scheme and plan," was such that the very record upon which the Government had to rely to prove the convictions in turn marked them as evolving from a single scheme. There is of course no such language in the present information.

In the *Khan* case, where the alien was convicted of willfully attempting to evade the payment of federal income tax for the year 1946, and convicted in the same prosecution for committing the same offense twelve months later in connection with income tax due for 1947, the court held the convictions were *not* part of a "single scheme" within the same statute on which the appellant is here sought to be deported.

In the *Miceli* case, printed in the Federal Reporter as *"Fitzgerald v. Landon,"* the offenses of which he was convicted were (1) "indecent assault and battery on Carol Litano, a child under the age of 14," and (2) "during the three months next, before the making of this complaint,

was a lewd, wanton and lascivious person in speech and behavior." In that case, the court held that the two offenses were incompatible in nature, and on that reasoning they were held to be separate and distinct offenses and not arising out of a single scheme.

While it appears that the appellant submitted the case on the record, it is clear that the presentation of different evidence was necessary to prove each of the offenses charged against the plaintiff and the others for the reasons indicated in the distinctions in the two crimes pointed out above. The fact that the two offenses followed each other closely in point of time and were of a similar character is immaterial and does not automatically make them a part of a "single scheme." The Immigration Service has reached this conclusion in many of its interim decisions.

The language in the *Khan* case, in which Judge Barnes of the Ninth Circuit wrote the opinion, is particularly applicable to this case and is as follows:

> ". . . The evidence required on each count was necessarily different, and referred to acts occurring a year apart. This, alone, is persuasive that two unrelated crimes were charged. In the absence of all evidence to the contrary, complete crimes committed on differeing dates or in differing places are considered separate and different crimes, and support separate charges. Could the defendant in this case urge that there was but one substantive offense charged against him, and hence that the government was required to choose for which year it desired to prosecute a defendant? Obviously not."

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Board of Immigration Appeals that appellant is deportable, be affirmed.

Respectfully submitted,

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